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328-103—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 724

CHARLES MARCUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals affirming the judgment of conviction (Pet. App. 1a–9a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1968 (Tr. 1789).[1] The petition for a

[1] "Tr." references are to the transcript of record certified to this Court; "R." references are to petitioner's appendix in the court of appeals and "Supp. R." references are to the government's appendix in the court of appeals. The appendices filed by the petitioner and the government in the court of appeals have been lodged by the government with the Clerk of this Court.

writ of certiorari, filed on November 12, 1968, is out of time under Rule 22(2) of the Rules of this Court.

QUESTIONS TENDERED

1. Whether an impermissible comment on petitioner's failure to testify was made by the prosecutor in his closing summation.

2. Whether prejudicial errors were made in the trial court's charge to the jury.

3. Whether material admissions made by the petitioner during the investigation were adequately corroborated.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[26 U.S.C. 7201.]

SEC. 7206. FRAUD AND FALSE STATEMENTS.

> Any person who—
>
> (1) DECLARATION UNDER PENALTIES OF PERJURY.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and

> which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.
>
> [26 U.S.C. ~~726~~ 7206.]

STATEMENT

In 1966 petitioner was indicted in the United States District Court for the Southern District of New York for twelve violations of the Internal Revenue Code of 1954 (Tr. 1687–1698). Counts 1 to 4 charged that he had willfully attempted to evade his personal income taxes in violation of 26 U.S.C. 7201 (Pet. 2a). Counts 5 to 12 charged that he had willfully, under the penalties for perjury, made false corporate tax returns, in violation of 26 U.S.C. 7206(1), for five corporations which were wholly owned by petitioner and whose only business was cashing checks (Pet. 2a; Supp. R. 117a, 214a). Counts 8, 11, and 12 were dismissed (Supp. R. 214a). After a jury verdict of guilty on the remaining counts, petitioner was sentenced to concurrent terms of imprisonment for one year on each count and to fines totalling $30,000 (Tr. 1747). The court of appeals affirmed (Pet. 9a; Tr. 1789).

Petitioner, a certified public accountant, failed to report income from interest and from accounting fees, but primarily from fees for check cashing services. The government's computations showed the following

understatements of taxable income (Pet. 3a; Supp. R. 173a–174a):

Year	Taxable Income Reported	Government's Computation	Deficiency
1959	$3,555.87	$12,618.81	$9,062.94
1960	5,784.50	18,191.92	12,407.42
1961	3,729.55	19,326.05	15,596.50
1962	21,600.00	48,136.43	26,536.43

These figures include $4,776.83 in unreported interest from savings bonds and from eighteen savings accounts largely maintained in fictitious names (Govt. Ex. No. 168, line 34, R. 106a; Govt. Exs. 1–4, R. 84a, 86a, 88a, 90a; Supp. R. 141a, 151a). Petitioner had denied any interest income or the ownership of savings accounts or bonds (Supp. R. 118a, 121a, 124a, 128a, 133a). Although petitioner had stated that he had received about $1,500 annually in accounting fees from some five paying clients (Supp. R. 122a, 127a, 128a), the government's computations showed that, during the years in question, he had received annual sums ranging from $2,875 to $3,505 from sixteen paying clients (Supp. R. 122a, 127a, 140a, 149a; Govt. Ex. 168, line 31, R. 106a). Checks cashed for his customers by petitioner and totalling $10,279,282 were the basis of income charged to petitioner in the amount of $94,725.74 (Supp. R. 134a–136a, 141a–147a; Govt. Ex. 168, lines 16–30 and 32, R. 106a), as compared with total reported gross profits from business (including accounting fees) amounting to $45,779.91 for the four years involved (Govt. Exs. 1–4, R. 84a, 86a, 88a, 90a).

Most of the checks cashed by petitioner were deposited in some forty-three bank accounts maintained

in ten banks in names which, save for ten accounts in the names of his corporations and of himself, were fictitious (Supp. R. 24a–27a, 65a–66a, 124a, 127a; Govt. Exs. 168A, 168B, 168C, Tr. 1220, 1264, 1267). Large sums of such checks were also deposited by petitioner in accounts of his accounting clients, in substitution for currency received in the clients' legitimate businesses and to which petitioner had access in the course of making his clients' bank deposits (Supp. R. 67a–68a, 97a–99a, 106a, 137a; Tr. 753). Petitioner's fees for cashing these checks ranged from ½ percent to 3 percent (Supp. R. 33a, 38a, 43a, 44a, 74a, 75a, 76a). He informed the investigating agent that he had kept no books and records (Supp. R. 118a–119a, 126a), that he received a fee on all checks cashed or deposited in the various bank accounts (Supp. R. 117a–118a), and that in preparing his tax returns he computed his income on the basis of a ½ percent fee for cashing the checks so deposited (Supp. R. 118a, 125a, 128a, 144a, 157a, 167a).

ARGUMENT

The petition presents no reason for a departure from this Court's Rule 22(2), and tenders no issue which warrants review.

1. The prosecutor's rebuttal argument was not a comment on petitioner's failure to testify at the trial. Both the district court (Supp. R. 207a) and the court of appeals (Pet. 7a) interpreted the prosecutor's re-

buttal argument[2] as directed to petitioner's conduct during the investigation, and not of such a nature as would "naturally and necessarily" be understood by the jury as a comment on petitioner's failure to testify. The prosecutor disavowed any intent except to respond to the argument of defense counsel, and the latter acknowledged that he knew the context in which the prosecutor intended to comment (Supp. R. 207a).

The testimony of the investigating agent that petitioner admitted receiving a ½ percent fee on all checks cashed was based on oral statements by petitioner in the course of several interviews which were immediately thereafter reduced by the agent to writ-

[2] The prosecutor's remarks were as follows (Supp. R. 206):

I would like to turn for a minute to the other aspects of the statements of Mr. Marcus.

Mr. Robson would have you believe that this house of cards, just like Mr. Weinstein—excuse me, like Mr. Weinstein's check kiting activity, and that the whole thing is built on one-half of one per cent. First of all, as I said, we have the affidavit sworn to under oath by Mr. Marcus that he received one-half of one percent.

Mr. Marcus is not a stupid man. Nobody would [*sic*] could have run this operation is a stupid man. Mr. Marcus, I submit to you, avoided every opportunity to testify under oath. He may have felt erroneously that Mr. Ferrise could not take the stand to describe what happened, but he was unwilling, I submit to you, to submit himself to any question and answer statement under oath once it became clear to him that he was under investigation.

Also he was not anxious for his friend and colleague to realize the incredible size of the operation that he was engaged in, and that is why, I submit to you, he may not have wanted to talk to Mr. Ferrise in the presence of Mr. Weisberg, or the presence of Mr. Pryor.

This was a very involved and very lucrative operations [*sic*] and Mr. Marcus may not have wanted to divulge it to those people.

ten memoranda and signed by himself and the other agent who was present (Tr. 1058, 1136; Supp. R. 115a, 132a). In cross-examining the agent, petitioner's attorney developed the fact that on an occasion when petitioner was examined under oath in the presence of a stenographer pursuant to an Internal Revenue Service summons to produce corporation records, petitioner not only produced no records (Supp. R. 132a) but refused to discuss how he had computed the income of the corporation (Supp. R. 155a–156a). The defense also called witnesses to various occasions when petitioner refused to speak to the investigating agent, and, in summation, defense counsel argued to the jury (Supp. R. 200a–201a) that petitioner was not such an "idiot" as to have made a "blanket admission" of receiving a ½ percent fee on every check cashed. Petitioner made no objection to the prosecutor's rebuttal argument until the prosecutor concluded his summation and then asked solely for a mistrial. He had earlier requested the trial court to omit any charge touching on petitioner's failure to testify (Supp. R. 195a–197a).

His failure either to make a prompt objection or to request an instruction curative of the comment, which at most was imprecise or ambiguous, should preclude petitioner from raising the issue on appeal. *United States* v. *Nasta,* 398 F. 2d 283 (C.A. 2); *Holden* v. *United States,* 388 F. 2d 240, 242 (C.A. 1); *Fogarty* v. *United States,* 263 F. 2d 201, 204 (C.A. 5); *Samuels* v. *United States* (C.A. 5), 22 A.F.T.R. 2d 5607, petition for certiorari pending, No. 702, this Term; *Birnbaum* v. *United States,* 356 F. 2d 856, 866

(C.A. 8); *Isaacs* v. *United States,* 301 F. 2d 706, 736 (C.A. 8), certiorari denied, 371 U.S. 818. This is particularly so here because, as the court of appeals noted, "there was an abundance of evidence to support the conviction" (Pet. 4a).

In so far as the prosecutor's remarks were directed at petitioner's refusal to answer questions when responding to the Internal Revenue Service summons during the investigation, the record shows not only that petitioner's counsel first adverted to this fact in argument, but that the evidence of this refusal was first introduced in petitioner's cross-examination by highly leading questions to the agent (Tr. 1131, 1138, 1303–1304; Supp. R. 155a–156a). Consequently, petitioner may not complain of responsive comment thereon. *United States* v. *White,* 377 F. 2d 908, 911 (C.A. 4); *United States* v. *Hoffa,* 349 F. 2d 20, 51 (C.A. 6), affirmed, 385 U.S. 293.

2. (a) The court of appeals correctly ruled (Pet. 8a) that, in the absence of any exception by the petitioner, it was not plain error requiring reversal for the trial court to charge the jury (Tr. 1624; Supp. R. 217a) to acquit if they found that it was "more likely that the defendant is innocent than guilty * * *". Though the court below has held such a charge reversible error in combination with other prejudicial error (*United States* v. *Hughes,* 389 F. 2d 535, 537), it has also held that an identical charge does not warrant reversal where no exception was taken thereto, the judge correctly stated the burden of proof elsewhere in the charge, and the trial was otherwise free from prejudicial error (*United States* v. *Baratta,* 397 F. 2d 215, 227). On the day they were

impanelled (Tr. 5; Supp. R. 2a) and many times in the court's charge (Tr. 1592, 1593, 1594, 1595, 1596, 1600, 1601, 1623; Supp. R. 209a, 210a, 211a, 212a, 216a), the jurors here were told that a defendant's guilt must be proved beyond a reasonable doubt. There is no reasonable possibility that the jury was misled into applying inadequate standards in its deliberations.

(b) The court of appeals correctly ruled (Pet. 9a) that the jury could not have been misled into neglecting other issues simply because the trial judge prefaced his charge on willfulness (Tr. 1602–1604; Supp. R. 212a–213a) with his observation that he would "judge" it to be "[t]he most burdensome * * * issue with which you must wrestle * * *". The trial judge also said, "don't read into my words how I feel about this evidence on the issue of wilfulness" (Supp. R. 213a), and prefaced his charge with a substantial warning not to read any significance into his remarks or inflections (Tr. 1590; Supp. R. 208a). Counsel for petitioner had energetically argued the willfulness issue (Tr. 1510–1511, 1536–1537, 1542–1544; Supp. R. 198a–199a, 203a, 204a–205a) and requested (Tr. 1480–1482; Supp. R. 192a) instructions relating to good faith errors. The crucial nature of the willfulness issue fully warranted the trial court's choice of language.[3]

[3] The court of appeals properly observed (Pet. 9a) that no discussion was warranted of petitioner's contention (Pet. 13–14) that, in explaining to the jury why Counts 8, 11 and 12 had been dismissed and should be disregarded (Tr. 1608; Supp. R. 214a), the trial court needlessly reminded the jury of the connection between these counts and the previously stricken testimony of a government witness. Because the reason for the dis-

3. The court of appeals (Pet. 4a) correctly applied the standards for corroboration of admissions enunciated by this Court, *i.e.*, the requirement of independent evidence tending to establish that the admissions were trustworthy (*Opper* v. *United States*, 348 U.S. 84, 93) or tending to establish the crime of tax evasion without resort to the admissions (*Smith* v. *United States*, 348 U.S. 147, 158).

Substantial understatements of income were established by the evidence independent of petitioner's admissions. Arthur Streit testified that during the years 1959–1962, petitioner charged him a 2 percent fee (3 percent for one period) for cashing checks (Supp. R. 73a–75a), and Howard Weinstein testified that during these years petitioner charged him 1 percent (2½ percent on weekends) for cashing checks (Supp. R. 39a, 43a–44a). For 1961 Streit (as Alcile Fabrics Corporation) (Supp. R. 73a, 76a, 138a) and Weinstein (Supp. R. 44a–45a, 139a–140a) cashed checks with petitioner in the approximate amounts of $145,647.58 and $1,618,528, respectively (Govt. Ex. 168, lines 22 and 27, R. 106a), which, at the lower of the rates charged, produces $19,098.23 in fees. Addition of this amount and petitioner's accounting fees of $2,995, plus interest of $4.98 and corporate income of $5,169.62 (Govt. Ex. 168, lines 31, 32 and 34, R. 106a) indicates a total 1961 gross income of $27,267.83, compared with $6,930.61 in gross income reported by petitioner (Govt. Ex. 3, page 3, R. 88a) and with

missal of these counts was a matter of record that had been heard by the jury, the trial court's explanation seems eminently proper as a precaution against possible confusion of the jury.

$29,746.87 in gross income (Tr. 1368–1369; Supp. R. 172a) which is based in part on petitioner's admission. For 1959 and 1960, this manner of calculation produces understatements in reported gross income of $1,020.64 and $7,476.36, respectively. The unreported interest and additional accounting fees were, of course, proved in the face of petitioner's denial and not on the basis of his admissions.

Petitioner's admissions of his fees from check cashing activities were amply shown to be trustworthy. Numerous bank employees corroborated petitioner's admitted control of the bank accounts involved (Supp. R. 3a, 7a, 11a, 12a–13a, 14a, 17a, 18a, 19a, 20a, 21a, 22a, 23a) and other witnesses testified that they permitted him to maintain bank accounts in their name (Supp. R. 27a, 29a). Petitioner's customers identified large numbers of checks cashed by them with petitioner for a fee and thereafter deposited in, or negotiated through, his accounts (Supp. R. 44a–45a, 76a, 138a–140a). Corporation tax returns, signed by petitioner and on which "commissions" were deducted in the exact amount of the declared corporation income (R. 92a, 94a, 96a, 98a, 100a, 102a 104a), corroborated petitioner's admissions (Tr. 1064, 1353, 1355; Supp. R. 118a, 166a–167a) that he received all such "commissions" as they were earned. Furthermore, the corporate income was in excess of that reported (Tr. 1272, 1294–1295, 1365; Supp. R. 152a). Petitioner's admission of receiving a ½ percent fee on all checks cashed or deposited was corroborated by the witnesses who testified that they were charged fees ranging up to 3 percent, and by an affidavit

executed by petitioner in 1961, prior to the instant investigation, wherein he stated he received "one-half point * * * as a fee for check cashing" (Tr. 1394; Supp. R. 177a–178a).

Petitioner's statement that because he dealt only with reliable people he suffered no loss (Supp. R. 119a, 121a, 165a) was corroborated by his failure to claim bad debt losses in his tax returns. *United States* v. *Bender,* 218 F. 2d 869, 871–872 (C.A. 7), certiorari denied, 349 U.S. 920; *Siravo* v. *United States,* 377 F. 2d 469, 473–474 (C.A. 1).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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